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EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

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Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/707,184

Applicant(s)

Narayanaswamy et al.

Examiner

Lien Tran

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Nov. 6, 2000
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above, claim(s) 16-26 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-15 and 27-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- a) ☐ All b) ☐ Some\* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

## Attachment(s)

- 15) ☒ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 4
- 18) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other: \_\_\_\_\_

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1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
  - I. Claims 1-15 and 27-30, drawn to the dough article, classified in class 426, subclass 128.
  - II. Claims 16-26, drawn to the method of making the dough article, classified in class 426, subclass 496.
2. Inventions I and II are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case, the product as claimed can be made by another and materially different process such as mixing all the ingredients together in one step and dispensing the mixture into a container. The product does not require the separate blending and mixing steps of the process.
3. Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.
4. During a telephone conversation with Janal Kalis on Nov. 7, 2001 a provisional election was made with traverse to prosecute the invention of Group 1, claims 1-15 and 27-30. Affirmation of this election must be made by applicant in replying to this Office action. Claims 16-26 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

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5. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a petition under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(I).

6. Claim 10 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 10 is indefinite. It is unclear how claim 10 further limits claim 1 when it recites the same limitation as in claim 1.

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

8. Claims 1,3-5,8,10,14-15 and 27-29 rejected under 35 U.S.C. 102(a) as being anticipated by Le Flecher et al (EPO 868850 A 1).

Le Flecher et al disclose a ready-to-bake dough comprising a flour, fat and water. The dough has a water activity below .85 and it is packed in an essentially gas-impermeable pouch in an atmosphere of an inert gas containing less than 4% residual oxygen. The dough contains glycerol in order to control the required water activity. The dough contains a leavening system

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comprising encapsulated chemical raising system and an inert gas which is partially soluble in the dough. The inert gas is nitrous oxide. The dough density is between .5-.7g/ml. (See the entire reference)

The reference discloses all the limitations of the above cited claims. While the reference does not specifically disclose water, it states the dough has an overall water content of 18-25%; Thus, it is inherent that water is present in the dough.

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

11. Claims 2,6,7,9,11-13 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Le Flecher et al.

The teaching of Le Flecher et al is described above. Le Flecher et al do not disclose the dough is substantially free of a carbon dioxide gas producing leavening agent and sugar, a mixture

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of carbon dioxide and nitrous oxide, the container comprising a baking pan and the type of dough such as biscuit, dough, scone, pizza and English muffins.

While Le Flecher et al do disclose a CO<sub>2</sub> leavening system, they also disclose that preferably the leavening system comprises an inert gas which is partially soluble in the dough. Thus, it would have been obvious to one skilled in the art to exclude the carbon dioxide gas producing leavening agent because the inert gas is considered the preferred leavening agent. As to the use of carbon dioxide in combination with nitrous oxide, it would have been obvious to one skilled in the art to use any known inert gas or mixture of inert gases as long as the required oxygen content is obtained. It would also have been obvious to make the container to be a baking pan to have a convenient food package because this would eliminate the need of transferring the dough to a baking pan. As to the type of dough, it would have been an obvious matter of choice to substitute different kind of dough product in the teaching of Le Flecher to obtain different products having enhance shelf stability. The variation to obtain different type of dough would have been obvious to one skilled in the art because the types of dough claimed are well known. The inclusion or exclusion of sugar depends on the type of dough and it would have been obvious to include or exclude sugar depending on the kind of dough made.

12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Durst discloses storage stable, ready-to-eat baked goods.

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13. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

14. Claims 1-15 and 27-30 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-15 of copending Application No. 09/707676. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications are directed to dough product in a gas-impermeable container in which an inert gas is disposed containing less than 4% residual oxygen. The difference resides in the types of dough such as biscuit, scone, pizza versus pie crust, pita and pasta dough. Such difference is not patentably significant because it would have been an obvious matter of choice to select any type of dough. The dough products in both applications contain essentially the same major ingredients. It would have been obvious to vary the additives or amount to obtain a specific type of dough product.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.


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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is (703) 308-1868. The examiner can normally be reached on Wed-Fri .

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (703) 308-3959 . The fax phone number for the organization where this application or proceeding is assigned is (703) 305-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

November 9, 2001

  
LIEN TRAN  
PRIMARY EXAMINER  
*Group 1700*